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IN THE
COURT OF APPEALS OF INDIANA

KEVIN PARRISH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 55A01-0512-CR-563
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MORGAN CIRCUIT COURT
The Honorable Matthew G. Hanson, Judge
Cause No. 55C01-0305-FD-0134

January 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a jury trial, Kevin Parrish was convicted of one count of Neglect of a Dependent, a Class D Felony,[1] and one count of Failure to Comply with Compulsory School Attendance, a Class B Misdemeanor.[2] Upon appeal, Parrish presents three issues, which we restate as: (1) whether the trial court erred in denying Parrish's motion for a directed verdict at the close of the State's evidence; (2) whether the trial court erred in admitting evidence regarding his daughter's absences during the prior school year; and (3) whether the trial court erred in sentencing Parrish to the maximum sentence without finding aggravating circumstances.

We affirm the convictions but reverse and remand for resentencing.

The record reveals that Parrish is the father of K.P., who in August of 2001 was in the first grade[3] at Northwood Elementary School in Mooresville, Indiana. In that month, K.P. was absent from school six and one-half days, was tardy once, and left school early twice. During September of 2001, K.P. was absent three and one-half days, and tardy twice.[4] The following month, K.P. was absent on October 3, 4, and 8. The school's principal sent a letter to the Parrishes dated October 10, 2001, explaining that, as of that date, K.P. had been absent a total of thirteen days and had been tardy three times. The letter explained the importance of regular attendance and explained that "[K.P.]'s reading

[1] Ind. Code § 35-46-1-4(a)(4) (Burns Code Ed. Supp. 2006).

[2] Ind. Code §§ 20-8.1-3-33, 20-8.1-3-37 (Burns Code Ed. Supp. 2004).

[3] As explained below, this was K.P.'s second year in the first grade.

[4] We would note, however, that one of the days that K.P. was tardy was September 11, 2001. On that day, the tragic events at the World Trade Center took place in the morning.

grade has suffered due to her absences." State's Exhibit 1. Still, K.P. was absent on October 11, 23, and 29.

On November 1, 2001, K.P.'s mother, Parrish's wife, met with the school principal, school counselor, and K.P.'s teacher to discuss K.P.'s attendance. K.P. came to the meeting with her mother that day but did not attend classes. The school principal informed Mrs. Parrish that the school corporation's attendance officer would become involved if K.P. continued to miss school without a valid medical reason. K.P. was tardy on November 7, 8, and 9, and was absent on November 12 without providing the school with a medical excuse. On November 13, 2001, Sarah Melone, the attendance officer for the Mooresville Consolidated School Corporation, sent a letter to the Parrishes explaining that, as of that date, K.P. had been absent from school seventeen and one-half days, had been tardy six days, and had left early three days. The letter was sent via certified mail with a return receipt requested. After noting K.P.'s absences, the letter stated in relevant part:

> "According to Indiana Law IC 20-8.1-3-33, it is unlawful for a parent to fail to ensure their children attend school. The law requires that a parent be put on notice of the violation before any proceedings may be instituted against the parent. Upon receiving notice, the violation must be terminated within one (1) school day after the notice is given. If absences and/or tardies then continue, no further notice is necessary. Each violation (absence/tardy) can constitute a separate offense per child. Failing to Ensure a Child's Education is a Class B Misdemeanor. Attached you will find a copy of the laws which pertain to education.
>
> Please consider this your official notice concerning . . . [K.P.]'s school attendance. Further absences and/or tardies may result in this matter being referred to the Morgan County Prosecutor's Office at which time charges may be instituted against you." State's Exhibit 3.

Parrish received this letter on November 16, 2001 and signed the return receipt. K.P. was withdrawn from Northwood Elementary on November 21, 2001.

On January 15, 2002, K.P. was enrolled at Paragon Elementary School in Martinsville, Indiana. K.P.'s attendance woes soon resurfaced. In January of 2002, K.P. was tardy one day. In February of 2002, K.P. was absent six and one-half days and tardy once. In March of 2002, K.P. was absent four days. In April of 2002, K.P. was absent for seven full days and two half days and was tardy on two other occasions. In May of 2002, K.P. was absent for five and one-half days and tardy twice. Of all of these absences, only two were covered by a medical excuse. Yet, despite her absences, K.P. was promoted to second grade.

On May 13, 2003, the State charged Parrish with one count of failure to comply with compulsory school attendance, a Class B misdemeanor, and one count of neglect of a dependant by depriving K.P. of an education, a Class D felony. On May 25, 2005, a jury trial was held, at the conclusion of which the jury found Parrish guilty as charged. At the conclusion of the sentencing hearing held on September 13, 2005, the trial court imposed a fine of one dollar for the misdemeanor conviction but imposed the maximum three-year sentence upon the felony conviction. With regard to the three-year sentence, however, the trial court ordered that none of the time be executed but that two and one-half years of the sentence be served on probation, with the option of early termination of probation after only two years.

Parrish filed a motion to correct error on October 13, 2005, which the trial court denied on November 3, 2005. Parrish filed a notice of appeal on December 5, 2005. On

December 7, 2005, Parrish filed a motion seeking permission to file a belated notice of appeal,[5] which the trial court granted on December 12, 2005. Parrish then filed a notice of appeal on December 16, 2005.

I

Directed Verdict

Parrish claims that the trial court erred in denying his motion for a directed verdict at the close of the State's evidence.[6] The State claims that Parrish has forfeited this claim by proceeding to present evidence during his case-in-chief. We recognize that there is precedent stating that an alleged error in the denial of a motion for a directed verdict is waived if the defendant proceeds to present evidence on his own behalf. See DeWhitt v. State, 829 N.E.2d 1055, 1063 (Ind. Ct. App. 2005) (citing cases stating that a defendant waives any error in denial of directed verdict motion by presenting evidence on his behalf), reh'g denied. However, as noted by this court in DeWhitt:

> "[I]t is well settled that a judgment on the evidence is properly granted only where there is a total absence of evidence as to the guilt of the accused or where the evidence is without conflict and susceptible to only one inference and that inference is in favor of the defendant. Conversely, it would seem to be a truism that where the party with the burden of proof wholly fails to sustain that burden in its case-in-chief, it is error for the trial court to deny a T.R. 50 motion [for a directed verdict]. It would thus seem to follow that a defendant need not sit silently and risk a jury conviction in such circumstance but should be permitted to present a defense without waiving a valid argument that he was entitled to a judgment on the evidence when

[5] In the motion for permission to file a belated notice of appeal, Parrish's counsel claimed that the December 5 filing simply "purported" to be a notice of appeal, but that by the time the trial court appointed appellate counsel for Parrish on December 6, 2005, the time limit within which Parrish was required to file a notice of appeal had already expired.

[6] Indiana Trial Rule 50 governs motions for "Judgment on the Evidence," which in the caption of the rule is also referred to as a "Directed Verdict."

> he made his motion at the conclusion of the State's case. An erroneous denial of a motion for judgment on the evidence would appear to be just as erroneous at the conclusion of the trial as it was when the motion was overruled." Id. at 1063-64 (citations omitted).

Thus, there is precedent supporting the notion that Parrish's argument in this regard has been forfeited. However, even if we considered Parrish's claim regarding his motion for a directed verdict, he would not prevail.

Parrish's argument with regard to the directed verdict is that there was a complete lack of evidence with regard to the *mens rea* element of the crimes for which he was convicted. In order to convict Parrish of failure to comply with compulsory school attendance, the State was required to prove that he: (1) knowingly, (2) failed to ensure that K.P. attended school, (3) as required under Indiana's compulsory school attendance law. Hamilton v. State, 694 N.E.2d 1171, 1172 (Ind. Ct. App. 1998) (citing I.C. §§ 20-8.1-3-33(a) and 20-8.1-3-37).[7] Additionally, before the State may file charges for failure to ensure attendance, the school superintendent or his designee must serve the parent with proper notice of the child's failure to attend school. Id. (citing Ind. Code § 20-8.1-3-33(b)). "Thus, the State must also prove beyond a reasonable doubt that the parent received notice in the required form." Id.

Here, Parrish acknowledges that there was evidence that he received the required notice, as he admitted at trial that he signed the return receipt for the notice letter sent on November 13, 2001 and received on November 16, 2001. He claims, however, that the State, during its case-in-chief, failed to prove that he read the letter or otherwise knew

[7] In 2005, I.C. § 20-8.1-3-33 was recodified at Indiana Code § 20-33-2-27 (Burns Code Ed. Repl. 2005), and I.C. § 20-8.1-3-37 was recodified at Indiana Code § 20-33-2-44 (Burns Code Ed. Repl. 2005).

about his daughter's attendance problems. We are unable to agree. The jury could reasonably infer from Parrish's receipt of the notice letter that he knew about his daughter's attendance problems. There was no need for direct evidence that he opened and read the letter. See Quarles v. State, 763 N.E.2d 1020, 1023 (Ind. Ct. App. 2002) (defendant's knowledge of his license suspension could be inferred from the printout of his driving record which showed that suspension notices were mailed to his last known address); DeSantis v. State, 760 N.E.2d 641, 646 (Ind. Ct. App. 2001) (where defendant's driving record contained copies of suspension notices with indications that the notices had been mailed to defendant, evidence was sufficient to imply defendant's knowledge of his license suspension), trans. granted, opinion adopted by 778 N.E.2d 787 (Ind. 2002). Here, the evidence presented during the State's case-in-chief demonstrated that Parrish did in fact receive the notice as evidenced by his signature on the return receipt, and, from his receipt of the notice, Parrish's knowledge of his daughter's attendance problems may be reasonably inferred.[8] We therefore cannot say that the trial court erred in denying Parrish's motion for a directed verdict.

II

Evidentiary Error

Parrish next argues that the trial court erred in admitting certain testimony into evidence over his objection. We first note that the decision to admit or exclude evidence is a matter within the sound discretion of the trial court, and the court abuses its

[8] Indeed, this inference was borne out when, during the State's cross-examination of Parrish during Parrish's case-in-chief, Parrish testified that he knew of the letter's contents after he woke up later that day.

discretion only where its decision is clearly against the logic and effect of the facts and circumstances before it. Collins v. State, 826 N.E.2d 671, 677 (Ind. Ct. App. 2005), trans. denied, cert. denied, 126 S. Ct. 1058 (2006).

Parrish specifically claims that the trial court erred in concluding that his questioning "opened the door" to otherwise inadmissible evidence regarding K.P.'s absences during the prior school year, i.e. 2000-2001. Our review of the transcript, however, reveals that no such evidence was admitted, regardless of whether Parrish opened the door.

Parrish's trial counsel, in an attack upon the effect that K.P.'s absences had upon her education, asked Ms. Babbitt, the attendance officer for the Martinsville Metropolitan School District, whether K.P. had been promoted to the second grade. Ms. Babbitt responded, "I believe this was her second year in first grade. Therefore, she was promoted to second grade." Transcript at 206. Upon re-direct examination, the State asked if the school had a policy to retain a child two years in a row, to which Ms. Babbitt responded, "I think they always indicated that serving the third year in the same grade probably was not going to be productive." Tr. at 207. The State then asked, "[W]as this [K.P.]'s second year in first grade already?" Ms. Babbitt then stated, "This was basically her second year because she had been, the previous year – this is the 2001-2002 school year – during the 2000-2001 school year. . . ." Tr. at 207. Parrish's attorney then objected and moved to strike, noting that the charging information referred to attendance problems only during the 2001-2002 school year. After brief argument by counsel, the trial court concluded that Parrish had opened the door to this line of questioning, and

allowed the witness to answer the question. Ms. Babbitt then stated, "[S]o during the 2000-2001 school year, [K.P.] was enrolled at Newby Elementary for a short time and then was withdrawn for home schooling and then re-enrolled for the 2001-2002 school year."[9] Tr. at 208. The State asked no further questions.

From this, it is apparent that Ms. Babbitt never actually testified with regard to K.P.'s absences during the 2000-2001 school year. Instead, she simply testified that K.P. was withdrawn in order to be home-schooled, then re-enrolled the following year. Because the allegedly prejudicial evidence which Parrish now contends was improperly before the jury was never actually before the jury, we cannot conclude that the trial court erred. Nor are we able to say that the evidence that was admitted—that K.P. was withdrawn during the 2000-2001 school year to be home schooled only to be re-enrolled the next year—was unduly prejudicial such that reversal is required. In short, we find no reversible evidentiary error.

III

Sentencing

Parrish lastly contends that the trial court erred in imposing the maximum three-year sentence without identifying aggravating factors.[10] The State concedes that the trial

[9] Ms. Babbitt testified that both of these enrollments were for the first grade.

[10] Because Parrish committed the instant offenses during the 2001-2002 school year, sentencing in this case was controlled by the statutes in effect prior to the amendatory provisions which became effective on April 25, 2005. See Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied; Ford v. State, 755 N.E.2d 1138, 1143 (Ind. Ct. App. 2001), trans. denied. At that time, Indiana Code § 35-50-2-7 (Burns Code Ed. Repl. 2004) provided that "[a] person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 ½) years, with not more than one and one-half (1 ½) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances."

court did not identify any aggravating factors, either during sentencing or in its sentencing order. Our review of the record reveals the same. We therefore agree with the parties that the trial court erred when it imposed the maximum sentence without supporting its decision with aggravating circumstances. The State requests that we either remand so that the trial court could find aggravating factors to justify the sentence or sentence Parrish to the presumptive sentence. We choose the latter. We therefore remand with instructions that the trial court impose the presumptive sentence of one and one-half years. This sentence shall be suspended pursuant to the trial court's original conditions.

The judgment of the trial court is affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this opinion.

ROBB, J., and BARNES, J., concur.